

Application No.: 09/990601

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**Remarks**

Claims 1-29 and 38-45 have been cancelled. Claim 30 has been amended. Claims 30-37 are pending in the application. Examination and reconsideration of the application, as amended, are requested.

Claim 30 has been amended to provide "closed language" as to the flame retardant in the plastic container composition. The flame retardant is now also mentioned in the preamble of the claim. By this amendment, only fire retardants that are non-halogenated are defined by the claim. All halogenated flame retardants (including halogenated epoxy) are expressly excluded from the claim. Antecedent basis for this amendment is to be found in the specification, for example, on page 13, lines 14-21, and in the original claim 30. It is submitted that this amendment adds no new subject matter or burden of search and presents the claim in condition for allowance or in better condition for appeal.

***The Rejections*****Claim Rejection – 35 USC 112, second paragraph****Paragraph 10**

Claims 8, 24, and 39 have been rejected as being indefinite

The rejections of claims 8, 24 and 39 are now moot due to the cancellation of these claims.

**Claim Rejection – 35 USC 102****Paragraphs 11-12**

Claim 30-32 and 37 are rejected under 35 USC 102(b) as being anticipated by Nagano et al.

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Nagano et al. teach a plastic pallet comprising polyolefin resin, a halogenated epoxy resin that is acknowledged to be a fire proofing agent, and optionally a non-halogenated fire proofing agent. In the words of Nagano et al., the invention is described in [0011] as follows: "This invention is regarding a fire proof polyolefin pallet made of polyolefin containing polyolefin, halogenized epoxy resin, and if necessary, other fire proofing agents, and talc." (emphasis added) In [0013], Nagano et al. says: "The halogenized epoxy resin used in this invention adds fire proofing to the polyolefin." In [0014], other fire proofing agents which can be used in this invention are named. These are in addition to the required halogenated epoxy as stated in [0011], as noted above. The requirement of halogenized epoxy, an acknowledged fire proofing agent as a component in the Nagano et al. composition is clear. This is confirmed in Examples 1 and 2 of Nagano where fire proof pallets having high impact resistance required the presence of halogenated epoxy. The comparison Example 1 of [0023] describes a fire proof pallet that contained no halogenated epoxy (but contains another fire proofing agent) and it was of inferior impact strength. The composition of comparison Example 1 does not meet the requirements of the present invention claims because no thermoset resin is present. All working Examples of Nagano et al. disclose halogenized epoxy and the products have good impact strength. Clearly, halogenized epoxy, acknowledged by Nagano et al. to be a fire proofing agent, is a required component of that invention. As such, Nagano et al. actually teach away from providing a fire proof pallet of good impact strength without halogenized epoxy.

In contrast, the amended language of claim 30 of the present invention expressly excludes the presence of halogenated epoxy in the plastic container. There can be no anticipation of claim 30 by Nagano et al. or even any obviousness.

Claim 31 discloses a pallet; claim 32 discloses various thermosetting resins; and claim 37 discloses the amount of flame retardant that can be present. It is submitted that each of these dependent claims adds additional definition to the independent claims and does not overcome the essential failure of Nagano et al. to teach a composition free of halogenated epoxy which is an acknowledged flame retardant. As noted above, the Nagano et al. comparative Example 1 contains no thermoset resin and cannot anticipate or make the present invention obvious. It is submitted this rejection has been overcome as to dependent claims 31, 32, and 37, as well as to independent claim 30.

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**Claim Rejections – 35 USC 103****Paragraphs 13-17, 21 and 22**

Rejections to claims 1-17, 25-29, 38, 40-45 are now moot due to cancellation of these claims.

**Paragraphs 18, 19, and 20**

18. Claims 33 and 34 have been rejected under 35 USC 103(a) as being unpatentable over Nagano et al. in view of Perez et al.

Nagano et al. has been discussed above and comments relating to this reference are incorporated herein by reference.

Perez et al. discloses polymeric networks and various catalysts and curing agents as well as a foam composition. Glass beads and bubbles can be added as adjuvants.

Claim 33 of the present invention relates to the plastic container comprising structural foam.

Applicant notes that the Office Action alleges on page 10, line 5, that “any foam can be considered structural”. Applicant strenuously disagrees with this allegation. The dictionary definition enclosed (The American Heritage College Dictionary, Houghton Mifflin Company, Boston, MA (1993) at page 1347, states that structural means “used in or necessary to building” and “a part of a structure that bears a weight or the structural piece used for such a part”. “Structural steel” is defined as “steel shaped for use in construction”. Similarly, “structural foam” would fairly mean “foam shaped for use in construction”. Clearly, “structural” relates to weight bearing parts and not all foam can be so designated. In Perez et al., foams are not disclosed to be “structural”.

As to the rejection, it has been shown that the present invention plastic container of claim 30 is distinguished from Nagano et al. because Nagano et al. requires the presence of halogenized epoxy, an acknowledged fire proofing agent, in its composition. Claim 30, as amended, expressly excludes halogenized epoxy from the composition of its plastic container. Perez et al. does not overcome this failure of Nagano to teach or disclosure a plastic composition with a non-

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halogenated flame retardant, and there can be no obviousness. It is submitted this rejection has been overcome and should be withdrawn.

As to the present invention claim 34, this claim relates to a plastic container as disclosed in claim 30 further comprising one or both of bubbles and glass beads as fillers. As just noted, Nagano et al. has been shown to require the presence of halogenized epoxy, an acknowledged fire proofing agent in its composition. In contrast, claim 30 of the present invention from which claim 34 depends expressly excludes halogenized epoxy because halogenized epoxy is acknowledged to be a fire proofing agent. The amendment to claim 30 requires that the present invention plastic container composition only contain non-halogenated flame retardants. Perez et al. does not overcome the essential failure of Nagano et al. to teach or suggest the present invention plastic container. This rejection has failed and should be withdrawn.

19. Claim 35 has been rejected under 35 USC 103(a) as being unpatentable over Nagano et al. in view of Ueeda et al.

Instant claim 35 relates to the plastic container of the invention further comprising an antimicrobial additive.

Applicant repeats the argument stated above as to the patentability of Claim 30 which has been shown to be neither anticipated by nor made obvious by Nagano et al. Ueeda et al. discloses a plastic pallet (polypropylene sheet – no epoxy is mentioned or suggested) comprising an antimicrobial agent. As to claim 35, Ueeda et al. does not overcome the essential failure of Nagano et al. to teach or suggest a plastic container containing a non-halogenated flame retardant as its sole flame retardant. This rejection has failed and should be withdrawn.

20. Claim 36 has been rejected under 35 USC 103(a) as being unpatentable over Nagano et al. in view of Nakacho et al.

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Instant claim 36 relates to the plastic container of the invention wherein the flame retardant is selected from ammonium phosphates, compounds containing phosphorus-nitrogen bonds, and cyclic phosphates.

Applicant repeats the argument stated above as to the patentability of claim 30 which has been shown to be neither anticipated by nor made obvious by Nagano et al.

Nakacho et al. discloses a resin composition (thermoplastic or thermoset resin; no combination of thermoplastic and thermoplastic resin are taught or suggested) and certain specific flame retardants. See Nakacho et al. Col. 11, lines 13-17. Applicant has reviewed all 67 examples in Nakacho et al. and could not find any thermoplastic/thermoset mixtures.

Nagano et al. fails to teach or suggest a thermoplastic/thermoset composition containing a non-halogenated flame retardant. Nagano et al., the primary reference, requires the presence of a halogenated epoxy, an acknowledged flame retardant in its composition. Nakacho et al. discloses certain non-halogenated flame retardants for use in a thermoplastic or a thermoset composition. There is no suggestion that the Nakacho et al. flame retardants can be used in a combined thermoplastic/thermoset composition. Halogenated epoxy is required in the Nagano et al. composition. (When halogenated epoxy is not used in Nagano et al., as in its comparative Example 1, its composition has no thermoset resin and does not teach or suggest the present invention plastic container composition).

In contrast, the present invention requires a thermoplastic/thermoset composition and a fire-retardant, the fire-retardant being free of halogenation. Nakacho et al. does not overcome the failure of Nagano et al. to teach such a composition. It is submitted this rejection has been shown to fail and should be withdrawn.

In sum, four references have been cited in the rejections to claims 30-37 in this Office Action. It is well-accepted in the patent arts that it is impermissible within the framework of 35 USC 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 230 USPQ 416 (Fed. Cir.1986). It is submitted that picking and choosing pieces of four references to reconstruct the present invention is improper.

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Further, selective hindsight is not applicable to the combination of prior art teachings. A claim cannot be used as a blue print for abstracting individual teaching from references. *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 227 USPQ 657 (Fed. Cir. 1985). It is submitted that the Office Action has used impermissible hindsight to reconstruct the present invention. The rejections should be withdrawn.

In view of the above, it is submitted that all rejections and objections to claims 30-37 have been overcome. Examination and reconsideration of the application, as amended, are requested. Allowance of claims 30 - 37 at an early date is solicited.

Respectfully submitted,

October 21, 2003  
Date

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Substance of Telephone Interview

Applicant's attorney, Lorraine Sherman, acknowledges with thanks the telephone interview kindly accorded her by Examiner Walter Aughenbaugh and Supervisory Patent Examiner Harold Pyon on June 6, 2003. An amendment to claim 30 was discussed and, in particular, "closed" language for the fire retardant in the claim was discussed. The Nagano et al. reference was reviewed and Applicant pointed out that Nagano et al requires the presence of halogenized epoxy (an acknowledged fire proofing agent) in its composition. This is expressly excluded by Applicant's amendment to claim 30 that requires a thermoplastic/thermoset composition and a flame retardant that can only be a non-halogenated flame retardant. Applicant's attorney argued the patentability of such a claim in view of Nagano et al.